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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

WILLIAM G. MORSCHAUSER,

Plaintiff and Appellant,

v.

CONTINENTAL CAPITAL, LLC et al.,

Defendants and Respondents.

E062278

(Super.Ct.No. SCVSS124603)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez, Judge. Affirmed.

Law Office of Stanley W. Hodge and Stanley W. Hodge for Plaintiff and Appellant.

Hagan & Associates, Cara J. Hagan and Jacquelyn M. Santos for Defendants and Respondents.

Plaintiff and appellant William G. Morschauser (Morschauser) appeals from an award of attorney fees and costs in favor of defendants and respondents Continental Capital, LLC (ConCap), Stephen J. Collias, and Thia Fuller (collectively referred to as

respondents), who prevailed on summary judgment. Morschauser does not contest the substance of the trial court's award of fees, arguing only that ConCap is a suspended legal entity, and therefore may not seek attorney's fees, or otherwise conduct litigation. ConCap is no longer a suspended entity. We therefore affirm.

## I. FACTS AND PROCEDURAL BACKGROUND

The facts underlying this litigation are largely irrelevant to the present appeal, and were discussed at some length in our opinion affirming the trial court's grant of summary judgment in favor of respondents (*Morschauser v. Continental Capital, LLC* (Dec. 14, 2012, E052930) [nonpub. opn.] (*Morschauser*)), as well as our opinions affirming the trial court's grants of summary judgment in favor of other defendants in the case (*Morschauser v. Graham Vaage & Cisneros* (Nov. 22, 2011, E050809) [nonpub. opn.]; *Morschauser v. T.D. Service Company* (Dec. 14, 2012, E052293 [nonpub. opn.])). Here, it suffices to note for context that a failed business venture, in which Morschauser owned an interest, led to foreclosure proceedings commencing in 2002 with respect to certain real property. (*Morschauser, supra*, E052930, at pp. 3-5.) In 2003, ConCap acquired ownership of the relevant promissory notes and deeds of trust. (*Id.* at p. 5.) After a settlement agreement was reached, ConCap received certain payments, and foreclosure proceedings were stopped. (*Id.* at pp. 8-9.) Foreclosure proceedings were again initiated when Morschauser defaulted on a final payment owed under the settlement agreement, but were stopped when payment was made. (*Ibid.*)

In 2005, Morschauser sued respondents and other parties. (*Morschauser, supra*, E052930 at p. 9.) The first amended complaint asserts four causes of action against

respondents, including two causes of action for fraud, one for negligence, and one for intentional infliction of emotional distress. (*Ibid.*) It alleges that Collias is a managing member of ConCap, and that ConCap is “the alter ego of [Collias] in that [he] is the managing member and sole decision-maker with unfettered discretion with respect to conducting the business of [ConCap].” It further alleges that Fuller is a ConCap “employee.”

In 2010, the trial court granted summary judgment in favor of respondents, and in our December 14, 2012 opinion, we affirmed the judgment. (*Morschauser, supra*, E052930, pp. 9-10, 19.)

On March 4, 2014, respondents filed the motion for attorney fees and costs at issue in the present appeal, seeking a total sum of \$133,644.50. Morschauser did not file an opposition, instead filing on June 19, 2014, a request for continuance of the hearing on the motion for attorney’s fees for a minimum of 90 days. The request for a continuance, among other things, raises for the first time in the litigation the question of ConCap’s legal status, asserting that “ConCap is a suspended entity and does not have standing to bring a motion for Attorney Fees in this Court . . . .”<sup>1</sup> Attached in support of this assertion is a copy of a search result from the California Secretary of State’s website, showing ConCap’s status to be suspended, and showing that the entity’s agent for service of process resigned on June 4, 2004.

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<sup>1</sup> The request for a continuance is a voluminous document, extending to 280 pages with exhibits. The relevance of ConCap’s legal status to Morschauser’s purported need for a continuance is not apparent.

After a hearing, during which Morschauser again raised the issue of ConCap's legal status, the trial court denied Morschauser's request for a continuance, and granted respondents' motion for attorney's fees in full. A judgment in favor of respondents in the amount of \$133,644.50 was entered on August 22, 2014.

On April 22, 2016, on our own motion, we directed counsel for ConCap to complete one of three tasks: (1) file documentary proof that ConCap is not a suspended entity; (2) file documentary proof that an application for a certificate of revivor had been filed; or (3) file a declaration detailing when an application for a certificate of revivor was anticipated to be filed, and why such an application had not already been filed. We noted that "[n]ormally when a corporation's suspended status becomes known during litigation, a short continuance will be permitted to allow the suspended corporation to obtain reinstatement." We warned, however, that "if it appears ConCap is not taking expeditious steps towards obtaining a certificate of revivor, the court will strike respondents' brief as to ConCap . . . and proceed with the preparation of the tentative opinion accordingly."

On May 9, 2016, counsel for ConCap chose the third option, filing a declaration of counsel describing why an application for certificate of revivor had not yet been filed, and the steps being taken to prepare such an application. On August 30, 2016, counsel for ConCap submitted a copy of a certificate of revivor, showing that ConCap had been relieved of its suspension, and is "in good standing with the Franchise Tax Board," effective August 24, 2016. Additionally, on our own motion, we take judicial notice that

the publically accessible electronic records of the California Secretary of State now list ConCap's status as active.<sup>2</sup>

## II. DISCUSSION

The only arguments asserted by Morschauser on appeal rest on the proposition that ConCap is a suspended entity, and the consequences flowing from that status. While ConCap was a suspended entity at the time briefing in this appeal was completed, it has since been relieved of its suspension and restored to active status. Morschauser's asserted claims of error therefore fail, and we affirm the judgment.

With exceptions not relevant here, a suspended corporation is "disqualified from exercising any right, power or privilege." (*Timberline, Inc. v. Jaisinghani* (1997) 54 Cal.App.4th 1361, 1365 (*Timberline*)). This means a suspended corporation is "disabled from participating in any litigation activities." (*Palm Valley Homeowners Assn., Inc. v. Design MTC* (2000) 85 Cal.App.4th 553, 560 (*Palm Valley*)). Purporting to exercise the rights and powers of a suspended corporation is a misdemeanor (Rev. & Tax Code, § 19719), and a lawyer who knowingly represents a suspended corporation and conceals this fact from the court may be subject to sanctions (*Palm Valley, supra*, at p. 560).

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<sup>2</sup> On July 19, 2016, we informed the parties of our intent to take judicial notice of ConCap's current corporate status, as shown in the publicly accessible records of the California Secretary of State, and invited them, pursuant to Evidence Code sections 459, subdivision (c) and 455, subdivision (a), to present us with information relevant to the propriety of taking judicial notice of the matter, and the tenor of the matter to be noticed. We received no substantive responses from the parties.

Also with respect to judicial notice, we note that Morschauser has filed two separate requests for judicial notice, on July 28 and August 17, 2016. The requests are granted as unopposed, but the matters to be noticed are not relevant to the disposition of the present appeal, so they will not be further discussed.

Nevertheless, if a corporation's suspended status "only comes to light during litigation, the normal practice is for the trial court to permit a short continuance to enable the suspended corporation to effect reinstatement . . . to defend itself in court." (*Timberline, supra*, 54 Cal.App.4th at p. 1366.) Once the corporation's status has been reinstated, "[t]he legal rights of a suspended corporation are then revived, as an unconscious person is revived by artificial respiration." (*Bourhis v. Lord* (2013) 56 Cal.4th 320, 324.) "The revival of corporate powers validates any procedural step taken on behalf of the corporation while it was under suspension." (*Benton v. County of Napa* (1991) 226 Cal.App.3d 1485, 1490 (*Benton*).) The term "procedural step" is construed broadly in this context, encompassing "[m]ost litigation activity," including appearing on and filing motions, and obtaining a judgment. (*Id.* at pp. 1490-1491.)

As noted, ConCap has obtained a certificate of revivor and been restored to active status. The procedural steps to which Morschauser objected on the basis of ConCap's suspended status, therefore, have been "validated," including its efforts to obtain the award of fees and costs at issue, and to defend that award on appeal. (*Benton, supra*, 226 Cal.App.3d at p. 1490.) Morschauser asserts no other claims of error, so the judgment will be affirmed.

One final matter: pursuant to the California Rules of Court, rule 8.278, the party prevailing in a civil appeal is generally entitled to costs on appeal. In this case, however, respondents have prevailed by taking steps to revive ConCap only after Morschauser's briefing on appeal was completed, even though the issue of ConCap's status had first been raised months before, in the trial court. Even then, they did so only at the prompting

of this court's inquiry into the matter. In the interests of justice, therefore, we find it appropriate for the parties each to bear their own costs.<sup>3</sup> (Rules of Court, rule 8.278(a)(5).)

### III. DISPOSITION

The judgment is affirmed. The parties shall each bear their own costs on appeal. (Rules of Court, rule 8.278(a)(5).)

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HOLLENHORST

Acting P. J.

We concur:

MILLER

J.

CODRINGTON

J.

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<sup>3</sup> Our decision with respect to the award of costs here under the California Rules of Court is without prejudice to respondents' right to seek recovery of appellate attorney fees or costs on any other basis, including any applicable contractual attorney fee provision.